

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 20 1995

In the Matter of
Review of the Prime Time
Access Rule, Section 73.658(k)
of the Commission's Rules

MM Docket No. 94-123

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**REPLY TO OPPOSITIONS TO THE MOTION
OF THE COALITION TO ENHANCE DIVERSITY
FOR AN ORDER REQUIRING THE SERVICE OF CERTAIN DATA**

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TABLE OF CONTENTS

	<u>Page(s)</u>
SUMMARY	i
INTRODUCTION	1
I. THE COALITION'S MOTION IS TIMELY	3
II. THERE ARE VALID POLICY REASONS FOR THE COMMISSION TO ORDER COMMENTERS TO PRODUCE UNDERLYING ECONOMIC DATA IN THIS RULEMAKING PROCEEDING	4
III. INTV'S AND THE NETWORKS' CONCERNS ARE EITHER INVALID OR EASILY RESOLVED	7
A. Databases	7
B. Underlying Data	8
IV. GRANTING THE COALITION'S MOTION WILL EXPEDITE, NOT DELAY, THIS PROCEEDING	10
CONCLUSION.....	12

SUMMARY

The Commission's Notice of Proposed Rulemaking makes it clear that the Commission is seeking the submission of sophisticated economic analyses based upon empirical data. A Commission order requiring the production of data will allow a thorough independent review and analysis of all such analyses submitted by the other parties to the proceeding and the Commission itself. This, in turn, will ensure that the Commission has the benefit of the most complete and detailed record the parties can provide.

A Commission order requiring production of data will also promote a timely and orderly comment process. Such an order will likely prevent the inevitable delay if parties are forced to struggle to recreate the databases of other commenters. In addition, it will permit the parties and the Commission to focus on the merits of the questions presented, rather than on efforts to recreate economic databases (which may ultimately be impossible) and to reconcile economic analyses that are based on different data sets.

For the reasons discussed in this Reply, none of the objections raised by INTV or the Networks is valid with respect to the production of databases. With respect to the underlying data, the Coalition proposes a number of mechanisms that can be put into place that will alleviate any legitimate concerns. For all these reasons, the Commission should grant the Coalition's Motion.

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OF THE COALITION TO ENHANCE DIVERSITY
FOR AN ORDER REQUIRING THE SERVICE OF CERTAIN DATA**

The Coalition to Enhance Diversity (the "Coalition"), on its own behalf and on behalf of its members, hereby submits this reply to the Opposition of the Association of Independent Television Stations, Inc. ("INTV"), et al. ("INTV Opposition"), and to the Comments of Capital Cities/ABC, Inc., CBS, Inc., and the National Broadcasting Company, Inc. (collectively the "Networks") ("Networks' Comments") to the Coalition's Motion for an Order Requiring Commenters to Serve Certain Data on all Other Commenters ("Motion").

INTRODUCTION

The Coalition's purpose in filing the Motion was to ensure that the Commission has the benefit of the most thorough and detailed record that the parties can provide. INTV and the Networks profess to support this objective in principle,¹ but

¹ See Networks' Comments at 2; INTV Opposition at 2 ("We remain committed to providing the Commission with all the information it needs to render a decision in this proceeding").

as their responses to the Motion reveal, they are unwilling to take practical steps to achieve it.

Contrary to INTV and the Networks' suggestion, the Coalition is not asking the Commission to order some radical procedure that will serve to "impede, not enhance, the Commission's efforts to obtain accurate data concerning the Prime Time Access Rule."² Data production requirements far more burdensome than those suggested by the Coalition here are imposed, and complied with by parties, in regulatory agency and courtroom proceedings across the country every day.³ The reason is that the exchange of this type of data and information enables the parties and the decision-making authorities to spend their time and resources analyzing the merits of the questions presented, rather than on efforts to recreate economic databases (which may ultimately prove futile) and to reconcile economic analyses that are based on different data sets.

The fundamental notion that underlies INTV and the Networks' oppositions -- that providing the parties and the Commission with less, rather than more, information will somehow "enhance[] the Commission's efforts to obtain accurate data" concerning PTAR -- is simply unsupportable. The quality

2 INTV Opposition at 2.

3 For example, parties to rulemaking proceedings before the Federal Energy Regulatory Commission ("FERC") generally submit data underlying their economic analyses to both the agency and the other parties as a matter of course. As a result, the FERC has not found it necessary to order production of underlying data.

of the parties' submissions, and hence the quality of the record in this proceeding, will be significantly improved if the debate can remain focused on what the economic data teach us about the effects of PTAR, instead of devolving into questions and disputes about where data came from and how the Commission should choose between diametrically different conclusions that are drawn from entirely different data and evidence. The Commission's (and ultimately the public's) interest in reasoned decision-making will be served by granting the Coalition's motion.

I. THE COALITION'S MOTION IS TIMELY

In its letter informing the Coalition that it cannot agree to our proposal concerning the provision of data, INTV asserts that the Coalition's Motion is "premature," suggesting that this issue is more appropriately addressed once the parties' initial comments have been filed.⁴ This is incorrect. If the parties know before they present their economic analyses what supporting information they will need to submit, they can prepare it in the most effective and efficient manner possible.

⁴ Letter from George Shapiro to Diane Killory at 1 (Jan. 12, 1995) ("Shapiro Letter"). Mr. Shapiro's letter asserts that in a conference between the parties concerning this matter, a "lack of clarity that surfaced over just what your proposed production order does or does not encompass." Id. The purpose of the conference was to determine if the parties could agree upon some terms of production. The Coalition objects to INTV's attempt to characterize its good faith efforts to reach some compromise as somehow reflecting uncertainty concerning the scope of the Motion. Unlike the Coalition, INTV and the Networks have shown no willingness to compromise on their position that no data will be produced.

Indeed, both INTV and the Networks point to potential issues (treatment of confidential information, work product issues)⁵ that can be addressed satisfactorily if the parties know in advance that they will provide underlying data along with their economic analyses. Deferring resolution of this issue until the initial comments are filed can only serve to undermine the objective of providing the Commission with the most thorough and detailed record possible.

II. THERE ARE VALID POLICY REASONS FOR THE COMMISSION TO ORDER COMMENTERS TO PRODUCE UNDERLYING ECONOMIC DATA IN THIS RULEMAKING PROCEEDING

The opposing parties do not dispute that the Commission has the authority to issue an order requiring commenters to submit underlying data and source material along with their comments. INTV, however, argues that such an order is inappropriate because this is an informal rulemaking proceeding.⁶ This contention is erroneous for several reasons.

First, as INTV acknowledges, the Commission has differentiated this rulemaking proceeding from the vast majority of rulemaking proceedings in the past, and most likely in the future as well, by specifically asking the parties to "submit a rigorous economic framework for analysis and provide it with detailed economic data."⁷ In response to the

5 INTV Opposition at 7; Networks' Comments at 2.

6 INTV Opposition at 2-5.

7 Id. at 1-2. The fact-finding in this rulemaking proceeding is thus, in significant respect, more similar to the cases cited in the Coalition's Motion than to prior (Footnote 7 Continued)

Commission's request, some commenters have indicated that they intend to compile very large databases from a variety of sources, presumably for the purpose of econometric analysis.⁸ When the Commission knows, as it does here, that analyses based on such databases will be filed, it is perfectly appropriate for the agency to require that commenters submit sufficient information supporting those analyses so that other commenters (and the Commission itself) can review and analyze them in a meaningful manner. The fact that informal rulemakings generally do not seek the submission of detailed economic studies, and thus are not accompanied by orders of the nature requested here, does not mean that the Commission is barred from issuing an appropriately tailored order in this proceeding. The order requested is plainly within the Commission's power to grant.

Second, an order requiring production of data is necessary in order for the economic data and analyses supplied by the commenters to be independently reviewed and analyzed for purposes of reply comments. Both INTV and the Networks have stated, for example, that some of the information upon which

(Footnote 7 Continued)
rulemakings. The relevance of those cases turns not on their categorization as adjudicatory or rulemaking but, rather, on the consideration by the agency of economic analyses submitted by the parties to those proceedings. INTV's attempt to dismiss those cases as inopposite is therefore woefully inadequate.

⁸ See Joint Motion for Extension of Time by INTV, et al., filed November 29, 1994 ("INTV Motion").

they will be relying is not publicly available.⁹ Unless the Commission orders commenters to produce non-public information,¹⁰ there will be no way for other commenters -- or the Commission itself -- to independently review and analyze it.

Third, an order requiring production of economic data would avoid unnecessary expense and duplication of effort, as well as the attendant delay.¹¹ The Coalition recognizes that much of the information upon which the commenters will be relying will be publicly available. INTV states, for example, that it intends to utilize American Research Bureau Reports, which it informs the parties are available at the University of Georgia library.¹² It simply makes no sense, however, for other commenters to take the time and incur the expense of traveling to Georgia (or elsewhere) to recreate the data collection efforts of the other commenters in order to review and analyze those commenters' economic analyses. In short, both the quality of the record and the efficiency of the decision-making process will be enhanced significantly if the Commission requires all parties to submit the requested supporting information along with their economic analyses.

9 INTV Opposition at 6; Networks' Comments at 3.

10 As discussed below, such production can be done in a manner that preserves the confidentiality of proprietary information.

11 The inevitability of such delays, if the Coalition's Motion is not granted, is discussed below in Section IV.

12 Shapiro Letter at 1.

III. INTV'S AND THE NETWORKS' CONCERNS ARE EITHER INVALID OR EASILY RESOLVED

The Coalition has requested that commenters submitting economic analyses be required to serve two additional items with such analyses: (1) the data relied upon, and (2) a copy of the materials from which such data is derived.

INTV and the Networks allege that supplying this information would: (1) be burdensome, (2) be expensive, (3) divulge confidential information, and (4) violate contractual arrangements with and/or the copyrights of data suppliers.¹³ With respect to any databases compiled by commenters' economists, none of these concerns is valid. With respect to the materials from which the data is derived, these concerns, if valid, can be readily resolved. We address each in turn.

A. Databases

Commenters submitting economic analyses supported by empirical data will undoubtedly collect and organize their data in the form of databases. Given modern techniques of economic analysis, it is likely that these databases will be computerized. Reproduction of these databases for other commenters would simply be a matter of copying the data onto computer diskettes. Thus, the production of these databases to fellow commenters will not impose a significant burden.

13 Networks' Comments at 2-4; INTV Opposition at 5-9.

The Networks and INTV also raise concerns about confidentiality and copyright. The databases, however, will simply be aggregations of various data points collected by the commenter. If the databases are assembled by a consultant, there is no copyright issue. And if they are based on confidential information, that information is likely to be aggregated (or could otherwise be "masked") so as to preserve the confidentiality of the data, but nevertheless preserve its economic content. Procedures of this nature are common in cases in which economic analysis is central, and are undoubtedly familiar to the commenters and consultants with whom they are working. At a minimum, therefore, the Commission should grant the Coalition's Motion insofar as it seeks to have commenters supply copies of the databases on which they rely.

B. Underlying Data

INTV and the Networks raise the same basic concerns with respect to the submission of copies of the materials from which they derive their data.¹⁴ These concerns, to the extent valid, can be readily resolved.

The burden of reproducing the underlying source material, when considered in the context of administrative agency reporting and filing requirements, can hardly be considered excessive. As the Coalition explained to INTV and the Networks, it is not our contention that where data is taken

¹⁴ Networks' Comments at 2; INTV Opposition at 2.

from two pages of a five hundred page source, a copy of the five hundred page source must be provided; copies of the two pages, along with information sufficient to identify the source, is sufficient. In any event, if a commenter can show that submission of underlying materials to all requesting commenters would nevertheless be unduly burdensome, the Commission could order the commenter to file a single copy of the materials with the Commission. All other commenters would then be able to copy the materials at the Commission.

Copyright and confidentiality concerns can also be readily addressed. The use of the materials envisioned by the Coalition's motion is one that falls squarely within the bounds of the "fair use" doctrine. In addition, if commenters continue to be concerned with copyright issues, the Commission could require the parties to obtain licenses or sublicenses from copyright holders before submitting the materials. With respect to confidentiality concerns, if a commenter relies on company-specific proprietary data that cannot be masked in any way so as to preserve its confidentiality, the Commission could (upon application of the commenter) provide that the information will be submitted to the Commission under seal.¹⁵ The Commission could further provide that to the extent that the information is made available to outside counsel and consultants for parties to the proceeding, they will have

¹⁵ See 47 C.F.R. § 0.459.

access to the information only under the terms of an appropriate protective order.

**IV. GRANTING THE COALITION'S MOTION WILL
EXPEDITE, NOT DELAY, THIS PROCEEDING**

Finally, INTV and the Networks argue that granting the Coalition's Motion would delay the proceeding by creating disputes over data production.¹⁶ This is hyperbole. The commenters' economic consultants know what databases they are relying on and where the data employed in those databases came from. So long as they submit this information, there will be nothing to dispute.

Disputes and delays are certain to occur, by contrast, if the Commission does not grant the Coalition's Motion. Absent the requested order, parties will be left in the position of attempting to recreate, and then analyze, the databases used by the other parties. Accomplishing this task will plainly require significant delay at the reply comment stage. Moreover, once the task is complete, reply comments will have to address whatever difficulties the parties had in replicating the other commenters' databases and results. Indeed, considering that INTV has stated that it will need four months to gather and analyze the data, a Commission order to produce economic data will likely prevent requests for a four-month extension of time for purposes of filing replies. While such a delay might serve INTV's interest in light of its desire

¹⁶ INTV Opposition at 9; Letter from Sam Antar to Diane S. Killory 1 (Jan. 11, 1995).

to preserve the status quo,¹⁷ it decidedly would not serve the public interest.

The other possibility is that the parties will simply use alternative data sources, in which case the Commission will be left with the task of attempting to discern why different databases are generating different results and which results it should accept. The Commission, and the public interest, will be better served if the parties focus their efforts on joining each other's arguments and analysis on the precise terms on which they were presented.

INTV further asserts that it is somehow unfair to require it to provide other parties with a database for which it "expect[s] to expend substantial funds to create."¹⁸ But the reason INTV is expending these funds is to create evidence to be submitted in a public forum to support public policies that it would like to see the Commission adopt. No one is requiring INTV to participate in this proceeding or to submit economic evidence of a particular kind. Once it elects to do so, however, it cannot have a reasonable expectation that it should be able to treat this evidence as a proprietary product, or as some magical box that other parties may examine from the outside but not open. Would INTV seriously contend, for example, that it should not be required to make its comments available because it spent "substantial funds" to have lawyers

¹⁷ See INTV Motion.

¹⁸ Shapiro Letter at 2.

prepare them? The simple fact is that it is no more "unfair" to require INTV to make its economic evidence available to other commenters than it is to require INTV to make the arguments and other evidence contained in its comments available. Moreover, an order requiring the submission of underlying data will apply to all commenters in the proceeding, not just INTV. There is no plausible claim of unfairness.

CONCLUSION

There is no dispute that the quality of the record on which the Commission will base its judgment in this proceeding will be vastly improved if the Coalition's Motion is granted. If it is denied, on the other hand, the risk of additional delay, and the risk that the parties' comments and reply comments will read like the proverbial "ships passing in the night," will be significantly higher. The dispute is whether the objections raised by INTV and the Networks are simply red herrings or whether they have any legitimacy. There are simply no legitimate objections to sharing the databases, and the Coalition has proposed ways in which the underlying data can be shared in a manner that alleviates any legitimate concerns raised by INTV and the Networks.

Given the nature of the analysis the Commission has requested in this proceeding, the Coalition believes that the Commission's interest in a full and complete record will best be served by granting the Coalition's motion. The Coalition continues to stand ready to meet with the Commission staff

should the Commission wish to call in the parties to discuss
and attempt to resolve the issues raised concerning this
Motion.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Diane S. Killory", written over a horizontal line.

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January 20, 1995

CERTIFICATE OF SERVICE

I, Bonnie G. Eissner, do hereby certify that true copies of the foregoing **REPLY TO OPPOSITIONS TO THE MOTION OF THE COALITION TO ENHANCE DIVERSITY FOR AN ORDER REQUIRING THE SERVICE OF CERTAIN DATA** were hand delivered, unless otherwise indicated below, to the following individuals on this 20th day of January, 1995:

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